MOTIONS TO REOPEN OR RECONSIDER IMMIGRATION PROCEEDINGS

For individuals in removal proceedings, the Immigration and Nationality Act now contains provisions governing motions to reopen and reconsider. *See* 8 U.S.C. § 1229a(c)(5) and (6). For deportation cases pending before the April 1, 1997 effective date of IIRIRA, motions to reopen or to reconsider are governed by the administrative regulations. *See* 8 C.F.R. §§ 1003.2 and 1003.23(b) (formerly codified at 8 C.F.R. §§ 3.2 and 3.23).

I. DIFFERENCES BETWEEN MOTIONS TO REOPEN AND TO RECONSIDER

A. Motion to Reopen

A motion to reopen is based on factual grounds, and seeks a fresh determination based on newly discovered facts or a change in the applicant's circumstances since the time of the hearing. *See* 8 C.F.R. § 1003.2(c). A petitioner may also move to reopen to apply for discretionary relief. *See id*.; *Iturribarria v. INS*, 321 F.3d 889, 895-96 (9th Cir. 2003).

B. Motion to Reconsider

A motion to reconsider is based on legal grounds, and seeks a new determination based on alleged errors of fact or law. *See* 8 C.F.R. § 1003.2(b)(1). The motion to reconsider must be accompanied by a statement of reasons and supported by pertinent authority. *See id.*; 8 U.S.C. § 1229a(c)(5)(C) (removal proceedings); *Iturribarria v. INS*, 321 F.3d 889, 895-96 (9th Cir. 2003).

C. Motion to Remand

A motion to reopen or reconsider filed while an immigration judge's deportation decision is before the BIA on direct appeal will be treated as a motion to remand the proceedings to the immigration judge. *See Rodriguez v. INS*, 841 F.2d 865, 867 (9th Cir. 1987); *Guzman v. INS*, 318 F.3d 911 (9th Cir. 2003) (per curiam); 8 C.F.R. § 1003.2(b)(1) and (c)(4). "The formal requirements of the motion to reopen and those of the motion to remand are

for all practical purposes the same." *Rodriguez*, 841 F.2d at 867; *cf. Guzman*, 318 F.3d at 913 (holding that a motion to remand filed after petitioner's deportation order had become final, was properly treated as a motion to reopen).

II. JURISDICTION

The denial of a motion to reopen is a final administrative decision subject to judicial review in the court of appeals. *See Sarmadi v. INS*, 121 F.3d 1319, 1321 (9th Cir. 1997); *Arrozal v. INS*, 159 F.3d 429, 435 n.3 (9th Cir. 1998). The transitional rules of IIRIRA did not eliminate jurisdiction to review the denial of a motion to reopen, even if the underlying request for relief is discretionary. *See Arrozal*, 159 F.3d at 431-32; *see also Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1223 (9th Cir. 2002); *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1168, 1169-70 (9th Cir. 2003).

However, where an applicant has been ordered deported on account of certain enumerated crimes, this court lacks jurisdiction over a motion to reopen. *See Sarmadi*, 121 F.3d at 1322 (dismissing petition for review from denial of motion to reopen to apply for suspension because petitioner was ordered deported based on two crimes of moral turpitude); *Briseno v. INS*, 192 F.3d 1320, 1323 (9th Cir. 1999).

A. Finality of the Underlying Order

The filing of a motion to reopen does not disturb the finality of the underlying deportation order. *Pablo v. INS*, 72 F.3d 110, 113 (9th Cir. 1995). However, if the BIA grants a motion to reopen, "there is no longer a final decision to review," and the petition should be dismissed for lack of jurisdiction. *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886 (9th Cir. 2002) (order).

This court may review the denial of a motion to reopen even if a motion to reconsider is pending before the BIA. *Singh v. INS*, 213 F.3d 1050, 1052, n.2 (9th Cir. 2000).

B. Not a Jurisdictional Prerequisite

The filing of a motion to reopen or reconsider with the BIA is not a jurisdictional prerequisite to filing a petition for review with the court of

appeals. *Castillo-Villagra v. INS*, 972 F.2d 1017, 1023-24 (9th Cir. 1992).

C. No Tolling of the Time Period to File Petition for Review

The 30-day period for filing a petition for review with the court of appeals is not tolled by the filing of a motion to reopen. *See Stone v. INS*, 514 U.S. 386 (1995); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1258 (9th Cir. 1996).

D. No Automatic Stay of Deportation or Removal

The filing of a motion to reopen or reconsider does not automatically result in a stay of deportation or removal. *See* 8 C.F.R. § 1003.2(f); *Baria v. Reno*, 180 F.3d 1111, 1113 (9th Cir. 1999).

1. Exception

The filing of a motion to reopen an in absentia order of deportation or removal stays deportation. *See* 8 C.F.R. § 1003.2(f).

E. Consolidation

Judicial review of a motion to reopen or reconsider must be consolidated with the review of the final order of removal. 8 U.S.C. § 1252(b)(6).

F. Departure from the United States

Departure from the United States ends the right to make motion to reopen or reconsider. 8 C.F.R. § 1003.2(d). However, a motion to reopen may be made on the basis that the departure was not legally executed. *See Wiedersperg v. INS*, 896 F.2d 1179 (9th Cir. 1990) (holding that petitioner was entitled to reopen his deportation proceedings where his state conviction, which was the sole ground of deportation, was vacated); *Estrada-Rosales v. INS*, 645 F.2d 819 (9th Cir. 1981); *Mendez v. INS*, 563 F.2d 956, 958 (9th Cir. 1977).

III. STANDARD OF REVIEW

A. Generally

The court of appeals reviews the BIA's denial of a motion to reopen for abuse of discretion, regardless of underlying relief requested. *INS v. Doherty*, 502 U.S. 314, 323 (1992). "[M]otions to reopen are disfavored in deportation proceedings." *INS v. Abudu*, 485 U.S. 94, 107 (1988). However, this court will reverse the denial of a motion to reopen if it is "arbitrary, irrational, or contrary to law." *Singh v. INS*, 295 F.3d 1037, 1039 (9th Cir.), *cert. denied*, 123 S. Ct. 2605 (2003) (internal quotation omitted).

The BIA's determination of purely legal questions is reviewed de novo. *Singh v. INS*, 213 F.3d 1050 (9th Cir. 2000). Factual findings are reviewed for substantial evidence. *Sharma v. INS*, 89 F.3d 545 (9th Cir. 1996).

B. Full Consideration of All Factors

The BIA must show proper consideration of all factors, both favorable and unfavorable. *See e.g.*, *Virk v. INS*, 295 F.3d 1055 (9th Cir. 2002) (remanding where the BIA did not consider any of the factors weighing in petitioner's favor); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002) (remanding motion to reopen to apply for suspension where BIA did not engage in substantive analysis or articulate any reasons for its decision); *Arrozal v. INS*, 159 F.3d 429 (9th Cir. 1998); *Watkins v. INS*, 63 F.3d 844 (9th Cir. 1995).

The BIA must also articulate its reasons for denying relief. *See e.g.*, *Romero-Morales v. INS*, 25 F.3d 125, 129 (9th Cir. 1994) ("[T]he IJ (and the BIA) are required to consider the record as a whole [and] issue a reasoned opinion when considering a motion." (internal quotations omitted)); *Arrozal*, 159 F.3d at 433 ("[T]he BIA must indicate how it weighed [the favorable and unfavorable] factors and indicate with specificity that it heard and considered petitioner's claims.").

C. Irrelevant Factors

The BIA may not rely on irrelevant factors. *See e.g., Virk v. INS*, 295 F.3d 1055 (9th Cir. 2002) (holding that the BIA improperly considered the impact of an unrelated section of the INA and petitioner's wife's pre-naturalization misconduct); *Ng v. INS*, 804 F.2d 534, 539 (9th Cir. 1986) (holding that the BIA improperly relied on misconduct of petitioner's father).

IV. REQUIREMENTS FOR A MOTION TO REOPEN

A. Supporting Documentation

A motion to reopen must be supported by affidavits, the new evidentiary material sought to be introduced, and, if necessary, a completed application for relief. *See* 8 C.F.R. § 1003.2(c)(1); 8 U.S.C. § 1229a(c)(6)(B) (removal proceedings); *INS v. Wang*, 450 U.S. 139 (1981) (per curiam) (upholding BIA's denial of motion to reopen to apply for suspension because "the allegations of hardship were in the main conclusory and unsupported by affidavit."); *Patel v. INS*, 741 F.2d 1134, 1137 (9th Cir. 1984) ("[I]n the context of a motion to reopen, the BIA is not required to consider allegations unsupported by affidavits or other evidentiary material.").

However, the petitioner's failure to submit supporting documentation does not bar reopening where the INS either joins in the motion to reopen, or does not affirmatively oppose it. *See Konstantinova v. INS*, 195 F.3d 528, 530-31 (9th Cir. 1999) (noting that the BIA retains the ability to waive procedural errors); *Guzman v. INS*, 318 F.3d 911, 914 n.3 (9th Cir. 2003) (per curiam); *see also Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 381 (9th Cir.) (en banc) (assuming that where the BIA does not express concerns about form, relevancy or admissibility of the new evidence, "that any purported failure to comply with procedural requirements was not the stated reason for the BIA's" decision), *amended by*, 320 F.3d 858 (2003).

B. Previously Unavailable Evidence

The moving party must show that the new material evidence could not have been discovered and presented at the former hearing. *See INS v.*

Doherty, 502 U.S. 314 (1992) (holding that the Attorney General did not abuse his discretion by denying motion to reopen to apply for asylum and withholding based on lack of new material evidence); *Guzman v. INS*, 318 F.3d 911 (9th Cir. 2003) (per curiam) (affirming denial of motion to reopen to apply for suspension because "new" information was available and capable of discovery prior to his deportation hearing); *Bolshakov v. INS*, 133 F.3d 1279 (9th Cir. 1998) (finding no evidence of new circumstances to support asylum application); *Ramon-Sepulveda v. INS*, 743 F.2d 1307 (9th Cir. 1984) (reversing deportation order based on reopened proceedings because INS could have obtained the foreign birth certificate before the initial hearing).

C. Explanation for Failure to Apply for Discretionary Relief

If the motion to reopen is made for the purpose of obtaining discretionary relief, the moving party must establish that he or she was denied the opportunity to apply for such relief, or that such relief was not available at the time of the original hearing. *See INS v. Doherty*, 502 U.S. 314, 327 (1992) (holding that the Attorney General did not abuse his discretion by denying motion to reopen to apply for asylum and withholding because the applicant did "not reasonably explain[] his failure to pursue his asylum claim at the first hearing"); *INS v. Abudu*, 485 U.S. 94 (1988) (affirming BIA's denial of motion to reopen to apply for asylum where applicant filed to explain why the asylum application was not submitted earlier).

D. Prima Facie Eligibility for Relief

The applicant must also show prima facie eligibility for the underlying substantive relief requested. *See INS v. Wang*, 450 U.S. 139, 145 (1981) (per curiam); *Mendez-Gutierrez v. Ashcroft*, No. 02-70546, 2003 WL 21976473 (9th Cir. Aug. 20, 2003); *Dielmann v. INS*, 34 F.3d 851, 853 (9th Cir. 1994); *Limsico v. INS*, 951 F.2d 210, 213 (9th Cir. 1991); *Aviles-Torres v. INS*, 790 F.2d 1433, 1435-36 (9th Cir. 1986).

"A *prima facie* case is established when an alien presents affidavits *or* other evidentiary material, which, if true, would satisfy the requirements for substantive relief." *Hernandez-Ortiz v. INS*, 777 F.2d 509, 513 (9th Cir.

1985) (internal quotations and citation omitted).

However, the BIA has broad discretion to deny reopening even if prima facie eligibility is established. *See* 8 C.F.R. § 1003.2(a); *INS v. Rios-Pineda*, 471 U.S. 444, 449 (1985); *INS v. Abudu*, 485 U.S. 94, 105-06 (1988); *INS v. Wang*, 450 U.S. 139 (1981).

E. Discretionary Denial

Where ultimate relief is discretionary, such as asylum, the BIA may leap over the threshold concerns, and determine that the moving party would not be entitled to the discretionary grant of relief. *See e.g.*, *INS v. Abudu*, 485 U.S. 94, 105 (1988); *INS v. Rios-Pineda*, 471 U.S. 444 (1985); *Sequeira-Solano v. INS*, 104 F.3d 278, 279 (9th Cir. 1997); *Vasquez v. INS*, 767 F.2d 598, 600 (9th Cir. 1985). However, "the BIA must consider and weigh the favorable and unfavorable factors in determining whether to deny a motion to reopen proceedings on discretionary grounds." *Virk v. INS*, 295 F.3d 1055, 1060 (9th Cir. 2002) (remanding where the BIA did not consider any of the factors weighing in petitioner's favor); *Arrozal v. INS*, 159 F.3d 429, 433-34 (9th Cir. 1998).

F. Additional Considerations

1. Later-Acquired Equities

It is unclear whether equities acquired after a final order of deportation must be given less weight than those acquired before the applicant was found to be deportable. *Compare Caruncho v. INS*, 68 F.3d 356, 362 (9th Cir. 1995) ("The government rightly points out that equities flowing from [petitioner's] marriage should be given little weight because it took place . . . three months after the BIA's summary dismissal/final deportation order."), *and Vasquez v. INS*, 767 F.2d 598, 602 (9th Cir. 1985) (affirming denial of motion to reopen because petitioner's intra-proceedings marriage did not outweigh his violations of immigration law), *with Israel v. INS*, 785 F.2d 738 (9th Cir. 1986) (concluding that the BIA's denial of a motion to reopen to adjust status based on a "last-minute marriage" was arbitrary); *see also Malhi v. INS*, 336 F.3d 989 (9th Cir. 2003) (discussing regulatory presumption of fraud for intra-proceedings marriages and requirements of bona fide

marriage exemption).

2. Credibility Determinations

The BIA should not make credibility determinations on motions to reopen. *See Ghadessi v. INS*, 797 F.2d 804, 806 (9th Cir. 1986) ("As motions to reopen are decided without a factual hearing, the Board is unable to make credibility determinations at this stage of the proceedings."). Facts presented in supporting affidavits must be accepted as true unless inherently unbelievable. *Limsico v. INS*, 951 F.2d 210, 213 (9th Cir. 1991); *see also Monjaraz-Munoz v. INS*, 327 F.3d 892 (9th Cir. 2003) (holding that where the BIA cites no evidence to support a finding that petitioner's version of the facts is incredible, and none is apparent from the court's review of the record, petitioner's allegations will be credited).

V. TIME AND NUMERICAL LIMITATIONS

A. Generally

Generally, a motion to reopen must be filed within ninety days after a final decision is rendered. 8 C.F.R. § 1003.2(c)(2); 8 U.S.C. § 1229a(c)(6)(C)(i) (removal proceedings). A motion to reconsider must be filed within thirty days after the mailing of the BIA's final decision. 8 C.F.R. § 1003.2(b)(2); 8 U.S.C. § 1229a(c)(5)(B) (removal proceedings).

A party may make one motion to reopen and one motion to reconsider. 8 C.F.R. § 1003.2(b)(2) and (c)(2); 8 U.S.C. § 1229a(c)(6)(A) and (c)(5)(A) (removal proceedings). The single-motion limitation on motions to reopen does not apply to in absentia orders of deportation. *See Fajardo v. INS*, 300 F.3d 1018, 1021 (9th Cir. 2002) (noting that the limitation applies only to removal cases under IIRIRA's permanent rules).

The limitation period begins to run when the BIA sends its decision to correct address. *See Martinez-Serrano v. INS*, 94 F.3d 1256, 1258-59 (9th Cir. 1996).

B. Exceptions to the Ninety-Day/One-Motion Rule

1. In Absentia Orders

a. Exceptional Circumstances

If an applicant who is order deported or removed in absentia can show that he or she failed to appear for the hearing due to "exceptional circumstances," the applicant has 180 days to file a motion to reopen. *See* 8 C.F.R. § 1003.23(b)(4)(ii) and (b)(4)(iii)(A)(1).

"The statute defines 'exceptional circumstances' as 'circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien.'" *Singh v. INS*, 213 F.3d 1050, 1052 (9th Cir. 2000) (citing 8 U.S.C. § 1252b(f)(2)); *see also* 8 U.S.C. § 1229a(e)(1). "This court must look to the particularized facts presented in each case in determining whether the petitioner has established exceptional circumstances." *Singh v. INS*, 295 F.3d 1037, 1040 (9th Cir.), *cert. denied*, 123 S. Ct. 2605 (2003) (internal quotations omitted).

(1) Evidentiary Requirements

The BIA many not impose new proof requirements without notice. *See Singh v. INS*, 213 F.3d 1050 (9th Cir. 2000) (holding that the BIA violated due process where it required an applicant to produce an affidavit from his employer or doctor, and to immediately contact the immigration court); *cf. Celis-Castellano v. Ashcroft*, 298 F.3d 888, 891 (9th Cir. 2002) (holding that petitioner had notice of the BIA's evidentiary requirements).

(2) Cases Finding Exceptional Circumstances

Lo v. Ashcroft, No. 02-70384, 2003 WL 22016887 (9th Cir. 2003) (holding that ineffective assistance of counsel may constitute exceptional circumstances); *Monjaraz-Munoz v. INS*, 327 F.3d 892 (9th Cir. 2003) (same); *Fajardo v. INS*, 300 F.3d 1018, 1022 n.8 (9th Cir. 2002) (suggesting to BIA on remand that "it [would be] difficult to imagine" how the paralegal's failure to inform the petitioner "of her need to appear at her deportation hearing would not constitute an exceptional circumstance"); *Singh v. INS*, 295 F.3d 1037, 1039-40 (9th Cir.), *cert. denied*, 123 S. Ct. 2605

(2003) (holding that petitioner established exceptional circumstances where he arrived late to his hearing based on a misunderstanding, and had "no possible reason to try to delay the hearing" because he was eligible for adjustment of status); *Jerezano v. INS*, 169 F.3d 613 (9th Cir. 1999) (concluding that where applicant was 20 minutes late, and the IJ was still on bench, an in absentia order was too "harsh and unrealistic"); *see also Romani v. INS*, 146 F.3d 737 (9th Cir. 1998) (holding that where applicants were in the courthouse but did not enter the courtroom due to incorrect advice by lawyer's assistant, they did not fail to appear for their hearing, and reopening was warranted); *Romero-Morales v. INS*, 25 F.3d 125 (9th Cir. 1994) (remanding for examination of circumstances raised in applicant's motion for change of venue).

(3) Cases Finding No Exceptional Circumstances

Valencia-Fragoso v. INS, 321 F.3d 1204 (9th Cir. 2003) (per curiam) (holding that applicant who was 4 1/2 hours late, based on a misunderstanding of the time of the hearing, did not establish exceptional circumstances, especially where only possible relief was discretionary grant of voluntary departure); *Celis-Castellano v.* Ashcroft, 298 F.3d 888 (9th Cir. 2002) (severe asthma attack not exceptional); *Singh-Bhathal v. INS*, 170 F.3d 943, 944 (9th Cir. 1999) (holding that erroneous advice of immigration consultant to not appear at hearing did not constitute exceptional circumstances); *Shaar v. INS*, 141 F.3d 953 (9th Cir. 1998) (holding that the mere filing of a motion to reopen did not constitute exceptional circumstances excusing petitioners' failure to voluntarily depart by the deadline); *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997) (holding that applicant's failure to actually and personally receive the notice of hearing, which was mailed to his last known address, where receipt was acknowledged, was not an exceptional circumstance); *Sharma v. INS*, 89 F.3d 545 (9th Cir. 1996) (traffic congestion and parking difficulties not exceptional); *see also Hernandez-Vivas v. INS*, 23 F.3d 1557 (9th Cir. 1994) (holding under the previous standard that the mere filing of a motion for a change of venue did not establish reasonable cause for failure to appear).

b. Improper Notice of Hearing

A motion to reopen may be filed at any time if the applicant demonstrates improper notice of the hearing. *See* 8 C.F.R. § 1003.23(b)(4)(ii) *and* (b)(4)(iii)(A)(2).

Due process requires notice of an immigration hearing that is reasonably calculated to reach the interested parties. *See Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997). However, the applicant "does not have to actually receive notice of a deportation hearing in order for the requirements of due process to be satisfied." *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997) (holding that notice was sufficient where mailed to applicant's last address, where receipt was acknowledged).

(1) Presumption of Proper Notice

The INS will benefit from a presumption of effective delivery if the notice of hearing was properly addressed; had sufficient postage; and was properly deposited in the mails. *See Busquets-Ivars v. Ashcroft*, 333 F.3d 1008 (9th Cir. 2003). However, "[a] notice which fails to include a proper zip code is not properly addressed." *Id.* at 1010. "Notice mailed to an address different from the one [the applicant] provided could not have conceivably been reasonably calculated to reach him." *Singh v. INS*, No. 02-71594, 2003 WL 21947180 (9th Cir. 2003).

The applicant is responsible for informing the immigration agency of his current address. *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997); *cf. Lahmidi v. INS*, 149 F.3d 1011 (9th Cir. 1998) (holding, under the pre-1992 statutory provision, that applicant who was not informed of the change-of-address requirement established reasonable cause for failure to appear at the hearing); *Urbina-Osejo v. INS*, 124 F.3d 1314, 1317 (9th Cir 1997) (same).

Where an applicant seeks to reopen proceedings on the basis of nondelivery or improper delivery of the notice, the IJ and BIA must consider the evidence submitted by the applicant. *Arrieta v. INS*, 117 F.3d 429, 432 (9th Cir. 1997) (per curiam).

(2) Notice by Certified Mail

Notice sent by certified mail is entitled to a stronger presumption of

effective delivery. *See Busquets-Ivars v. Ashcroft*, 333 F.3d 1008, 1009 (9th Cir. 2003); *see also Arrieta v. INS*, 117 F.3d 429, 431 (9th Cir. 1997) (per curiam) (concluding that "notice by certified mail sent to an alien's last known address can be sufficient under the Act, even if no one signed for it"). This court has not addressed whether the presumption of delivery is rebutted where the INS lacks the certified return receipt. *See Busquets-Ivars*, 333 F.3d at 1009 (expressing " no opinion whether the record, lacking the return receipt, deprives the INS of the presumption that notice was effective").

In the case of notice delivered by certified mail, an applicant may rebut the presumption of effective service if "her mailing address has remained unchanged, that neither she nor a responsible party working or residing at that address refused service, and that there was nondelivery or improper delivery by the Postal Service." *Arrieta v. INS*, 117 F.3d 429, 432 (9th Cir. 1997) (per curiam).

(3) Notice by Regular Mail

"[D]elivery by regular mail does not raise the same 'strong presumption' as certified mail, and less should be required to rebut such a presumption." *Salta v. INS*, 314 F.3d 1076, 1079 (9th Cir. 2002) (holding that under the new statutory provision in 8 U.S.C. § 1229(a)(1), which does not require service by certified mail, the BIA erred by applying the strong presumptions of delivery accorded to certified mail under the former statutory provision). An applicant's sworn affidavit that neither she nor a responsible party residing at her address received the notice "should ordinarily be sufficient to rebut the presumption of delivery and entitle [the applicant] to an evidentiary hearing." *Id*. (noting that the applicant initiated the proceedings to obtain a benefit, appeared at an earlier hearing, and had no motive to avoid the hearing); *see also Urbina-Osejo*, 124 F.3d at 1317 ("To overcome the presumption of adequate notice when notice of a deportation hearing was sent by a constitutionally adequate method, Urbina must present[ ] substantial and probative evidence . . . demonstrating that there was improper delivery or that nondelivery was not due to the respondent's failure to provide an address where [s]he could receive mail.") (internal quotations omitted).

(4) Notice to Counsel

Notice to counsel is sufficient to establish notice to the applicant. *See Garcia v. INS*, 222 F.3d 1208 (9th Cir. 2000) (per curiam) (rejecting claim of inadequate notice where the INS personally served written notice of the hearing on applicant's counsel; noting that applicant did not raise an ineffective assistance of counsel claim). Where the INS fails to send notice to counsel of record, notice is insufficient. *See Dobrota v. INS*, 311 F.3d 1206 (9th Cir. 2002).

2. Asylum and Withholding Claims

A motion to reopen to apply or reapply for asylum or withholding based on changed country conditions that could not have been discovered or presented at the prior hearing, may be filed at any time. 8 C.F.R. § 1003.2(c)(3)(ii); 8 U.S.C. § 1229a(c)(6)(C)(ii) (removal proceedings).

3. Jointly-Filed Motions

An exception to the number and time restrictions exists if the motion to reopen is agreed upon by all parties and jointly filed. *See* 8 C.F.R. § 1003.2(c)(3)(iii); *Bolshakov v. INS*, 133 F.3d 1279, 1281-82 (9th Cir. 1998) (rejecting INS contention that the "exception in section 3.2(c)(3)(iii) is an administrative remedy that must be exhausted before an alien can petition the Court of Appeals").

4. INS Motions Based on Fraud

The government may, at any time, bring a motion based on fraud in the original proceeding or a crime that would support termination of asylum. 8 C.F.R. § 1003.2(c)(3)(iv).

5. Movant in Custody

A motion to reopen may be filed at any time if the applicant demonstrates that he or she was in state or federal custody. *See* 8 C.F.R. § 1003.2(c)(3) (referring to 8 C.F.R. § 1003.23(b)(4)(ii) *and* (b)(4)(iii)(A)(2)).

6. Sua Sponte Reopening by the BIA

The BIA may at any time reopen proceedings sua sponte. 8 C.F.R. § 1003.2(a). This court lacks jurisdiction to review a claim that the BIA should have exercised its sua sponte power to reopen deportation proceedings. *See Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Abassi v. INS*, 305 F.3d 1028, 1032 (9th Cir. 2002).

VI. EQUITABLE TOLLING

The ninety-day/one-motion limitations are not jurisdictional, and are amenable to equitable tolling. *See Iturribarria v. INS*, 321 F.3d 889 (9th Cir. 2003). Equitable tolling is available "when a petitioner is prevented from filing because of deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud, or error." *Id.* at 897.

A. Circumstances Beyond the Applicant's Control

In *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001) (en banc), this court held that equitable tolling is available "in situations where, despite all due diligence, [the party invoking equitable tolling] is unable to obtain vital information bearing on the existence of the claim," *id.* at 1193 (internal quotations omitted) (applying equitable tolling where INS officer repeatedly provided erroneous information to the applicant). "The inability to obtain vital information bearing on the existence of a claim need not be caused by the wrongful conduct of a third party. Rather, the party invoking tolling need only show that his or her ignorance of the limitations period was caused by circumstances beyond the party's control." *Id.*

B. Fraudulent or Deceptive Conduct

This court recognizes equitable tolling in cases involving ineffective assistance by an attorney or representative, coupled with fraudulent or deceptive conduct. *See e.g.*, *Iturribarria v. INS*, 321 F.3d 889 (9th Cir. 2003). "Where the ineffective performance was that of an actual attorney and the attorney engaged in fraudulent activity causing an essential action in her client's case to be undertaken ineffectively, out of time, or not at all, equitable tolling is available." *Id.; see also Fajardo v. INS*, 300 F.3d 1018 (9th Cir. 2002); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002);

Varela v. INS, 204 F.3d 1237 (9th Cir. 2000); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999).

C. Due Diligence

The filing deadline may be tolled until the petitioner, exercising due diligence, discovers the fraud, deception, or error. In cases involving ineffective assistance, this court has found that the limitation period may tolled until the petitioner meets with new counsel to discuss his file, thereby becoming aware of the harm resulting from the misconduct of his prior representatives. *See Iturribarria*, 311 F.3d at 899; *Fajardo v. INS*, 300 F.3d 1018, 1021 (9th Cir. 2002).

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Presented Through a Motion to Reopen

A motion based on alleged ineffective assistance of counsel is properly presented through a motion to reopen, rather than a motion to reconsider. *See Iturribarria v. INS*, 321 F.3d 889, 894-97 (9th Cir. 2003). "Ineffective assistance of counsel in a deportation proceeding is a denial of due process under the Fifth Amendment if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case." *Ortiz v. INS*, 179 F.3d 1148, 1153 (9th Cir. 1999) (internal quotation omitted). A due process violation requires a showing of prejudice, which can be made if counsel's performance "was so inadequate that it may have affected the outcome of the proceedings." *See Iturribarria*, 321 F.3d at 899-90 (internal quotations omitted).

B. The *Lozada* Requirements

A motion to reopen based on ineffective assistance of counsel generally must meet the procedural requirements set forth by the BIA in *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988). The petitioner must "1) submit an affidavit explaining his agreement with former counsel regarding his legal representation, 2) present evidence that prior counsel has been informed of the allegations against her and given an opportunity to respond, and 3) either show that a complaint against prior counsel was filed with the

proper disciplinary authorities or explain why no such complaint was filed." *Iturribarria*, 321 F.3d at 900; *see also Monjaraz-Munoz v. INS*, 327 F.3d 892 (9th Cir. 2003); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002).

1. Exceptions

However, the failure to comply with the *Lozada* requirements is not fatal where the alleged ineffective assistance is plain on the face of the administrative record. *See Castillo-Perez v. INS*, 212 F.3d 518, 525-26 (9th Cir. 2000); *see also Lo v. Ashcroft*, No. 02-70384, 2003 WL 22016887 (9th Cir. 2003) (noting court's flexibility in applying the *Lozada* requirements); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir. 2003) (failure to file bar complaint not fatal); *Melkonian v. Ashcroft*, 320 F.3d 1061 (9th Cir. 2003); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002) (substantial compliance sufficient); *Ontiveros-Lopez v. INS*, 213 F.3d 1121, 1124-25 (9th Cir. 2000) (holding that the BIA may not impose the *Lozada* requirements arbitrarily); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir.), *amended by*, 213 F.3d 1221 (9th Cir. 2000); *Varela v. INS*, 204 F.3d 1237, 1240 n.6 (9th Cir. 2000).

C. Cases Discussing Ineffective Assistance

Rojas-Garcia v. Ashcroft, 339 F.3d 814 (9th Cir. 2003) (failure to file brief on appeal to BIA constitutes ineffective assistance, but affirming the denial of habeas because petitioner could not show prejudice); *Monjaraz-Munoz v. INS*, 327 F.3d 892 (9th Cir. 2003) (holding that ineffective assistance of counsel constitutes exceptional circumstances warranting reopening); *Iturribarria v. INS*, 321 F.3d 889 (9th Cir. 2003) (holding that petitioner's counsel was ineffective, but affirming the denial of the motion to reopen because petitioner could not show prejudice); *Melkonian v. Ashcroft*, 320 F.3d 1061 (9th Cir. 2003) (rejecting IAC claim based on single statement of counsel during proceedings); *Rodriguez-Lariz v. INS*, 282 F.3d 1218 (9th Cir. 2002) (finding that petitioners established ineffective assistance); *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042 (9th Cir. 2000) (untimely appeal presented valid ineffective assistance claim); *Castillo-Perez v. INS*, 212 F.3d 518, 525-26 (9th Cir. 2000) (finding a "clear and obvious case of ineffective assistance of counsel" where counsel "failed, without any reason, to timely file [an] application" for suspension where petitioner was prima

facie eligible for relief); *Escobar-Grijalva v. INS*, 206 F.3d 1331, 1335 (9th Cir.) (holding that the IJ denied applicant her statutory right to counsel when he allowed an attorney whom she had never met and who had no understanding of her case to represent her), *amended by*, 213 F.3d 1221 (9th Cir. 2000); *Lata v. INS*, 204 F.3d 1241 (9th Cir. 2000) (finding that petitioner failed to show prejudice); *Lopez v. INS*, 184 F.3d 1097 (9th Cir. 1999) (holding that fraudulent legal representation by notary posing as an attorney established a meritorious IAC claim); *Ortiz v. INS*, 179 F.3d 1148 (9th Cir. 1999) (finding that petitioner failed to show prejudice); *Behbahani v. INS*, 796 F.2d 249 (9th Cir. 1986) (finding no ineffective assistance by accredited representative); *Magallanes-Damian v. INS*, 783 F.2d 931 (9th Cir. 1986) (holding that attorney's decision to forego contesting deportability was a tactical decision that did not rise to the level of ineffective assistance of counsel); *Roque-Carranza v. INS*, 778 F.2d 1373 (9th Cir. 1985) (holding that the petitioner must raise his ineffective assistance of counsel claims before the BIA in a motion to reopen).

VIII. CASES ADDRESSING MOTIONS TO REOPEN OR RECONSIDER

A. Motions to Reopen to Apply for Suspension

INS v. Rios-Pineda, 471 U.S. 444 (1985) (denied); *INS v. Wang*, 450 U.S. 139 (1981) (per curiam) (denied); *Iturribarria v. INS*, 321 F.3d 889, 894-97 (9th Cir. 2003) (denied); *Guzman v. INS*, 318 F.3d 911 (9th Cir. 2003) (per curiam) (affirming denial of motion to reopen to apply for suspension because "new" information regarding date of entry was available and capable of discovery prior to deportation hearing); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002) (reversed and remanded); *Arrozal v. INS*, 159 F.3d 429 (9th Cir. 1998) (reversed and remanded); *Shaar v. INS*, 141 F.3d 953 (9th Cir. 1998) (petition denied); *Urbina-Osejo v. INS*, 124 F.3d 1314, 1317 (9th Cir 1997) (remanded); *Sequiera-Solano v. INS*, 104 F.3d 278 (9th Cir. 1997) (petition denied); *Watkins v. INS*, 63 F.3d 844 (9th Cir. 1995) (reversed and remanded); *Limsico v. INS*, 951 F.2d 210, 213 (9th Cir. 1991) (petition denied); *Gonzalez Batoon v. INS*, 791 F.2d 681 (9th Cir. 1986) (en banc); *Vasquez v. INS*, 767 F.2d 598 (9th Cir. 1985) (suspension and adjustment; petition denied); *Saldana v. INS*, 762 F.2d 824 (9th Cir. 1985), *as amended by*, 785 F.2d 650 (9th Cir. 1986) (reversed and remanded); *Duran v. INS*, 756

F.2d 1338 (9th Cir. 1985) (suspension and asylum; reversed and remanded on suspension claim).

B. Motions to Reopen to Apply for Asylum and Withholding

INS v. Doherty, 502 U.S. 314 (1992) (holding that the Attorney General did not abuse his discretion by denying the motion to reopen proceedings); *INS v. Abudu*, 485 U.S. 94 (1988) (holding that the BIA did not abuse its discretion by denying the motion to reopen proceedings); *Cano-Merida v. INS*, 311 F.3d 960 (9th Cir. 2002) (granting petition for review of BIA's denial of motion to reconsider based on due process violation); *Mejia v. Ashcroft*, 298 F.3d 873 (9th Cir. 2002) (petition granted); *Konstantinova v. INS*, 195 F.3d 528 (9th Cir. 1999) (affirming denial of motion to reopen); *Bolshakov v. INS*, 133 F.3d 1279 (9th Cir. 1998) (petition denied); *Lainez-Ortiz v. INS*, 96 F.3d 393 (9th Cir. 1996) (petition denied); *Romero-Morales v. INS*, 25 F.3d 125 (9th Cir. 1994) (petition granted); *Chavez v. INS*, 723 F.2d 1431 (9th Cir. 1984) (petition denied); *Rodriguez v. INS*, 841 F.2d 865 (9th Cir. 1987) (reversed and remanded); *Ghadessi v. INS*, 797 F.2d 804 (9th Cir. 1986) (petition granted); *Sakhavat v. INS*, 796 F.2d 1201 (9th Cir. 1986) (reversed and remanded); *Aviles-Torres v. INS*, 790 F.2d 1433 (9th Cir. 1986) (reversed and remanded); *Larimi v. INS*, 782 F.2d 1494 (9th Cir. 1986) (petition denied); *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985) (reversed and remanded); *Maroufi v. INS*, 772 F.2d 597 (9th Cir. 1985) (remanding on asylum claim); *Sangabi v. INS*, 763 F.2d 374 (9th Cir. 1985) (petition denied); *Samimi v. INS*, 714 F.2d 992, 994 (9th Cir. 1983) (remanded).

C. Motions to Reopen to Apply for Relief Under the Convention Against Torture

Abassi v. INS, 305 F.3d 1029 (9th Cir. 2002) (petition granted in part); *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001) (vacated and remanded); *Khourassany v. INS*, 208 F.3d 1096 (9th Cir. 2000) (motion to remand denied); *Cano-Merida v. INS*, 311 F.3d 960 (9th Cir. 2002) (motion to reopen to apply for Convention relief denied).

D. Motions to Reopen to Apply for Adjustment of Status

Malhi v. INS, 336 F.3d 989 (9th Cir. 2003) (affirming BIA's denial of motion to remand to apply for adjustment of status based on marriage that occurred during deportation proceedings); *Zazueta-Carrillo v. INS*, 322 F.3d 1166 (9th Cir. 2003) (remanding BIA's denial of motion to reopen to apply for adjustment of status based on petitioner's failure to depart voluntarily within the time given by the BIA); *Castillo Ison v. INS*, 308 F.3d 1036 (9th Cir. 2002) (per curiam) (adjustment of status and immigrant visa; petition granted); *Abassi v. INS*, 305 F.3d 1028, 1032 (9th Cir. 2002) (holding that the court lacked jurisdiction to review the BIA's refusal to sua sponte reopen applicant's untimely motion to reopen to adjust status); *Konstantinova v. INS*, 195 F.3d 528 (9th Cir. 1999) (reversing and remanding denial of motion to remand to adjust status); *Eide-Kahayon v. INS*, 86 F.3d 147 (9th Cir. 1996) (per curiam) (petition denied); *Caruncho v. INS*, 68 F.3d 356 (9th Cir. 1995) (petition denied); *Dielmann v. INS*, 34 F.3d 851 (9th Cir. 1994) (petition denied); *Ng v. INS*, 804 F.2d 534 (9th Cir. 1986) (reversed and remanded); *Israel v. INS*, 785 F.2d 738 (9th Cir. 1986) (petition granted); *Mattis v. INS*, 774 F.2d 965 (9th Cir. 1985) (adjustment and waiver of excludability; reversed and remanded); *Vasquez v. INS*, 767 F.2d 598 (9th Cir. 1985) (suspension and adjustment; petition denied); *Ahwazi v. INS*, 751 F.2d 1120 (9th Cir. 1985) (petitions denied).

E. Motions to Reopen to Apply for Other Relief

Taniguchi v. INS, 303 F.3d 950 (9th Cir. 2002) (holding that petitioner failed to exhaust equitable tolling argument); *Virk v. INS*, 295 F.3d 1055 (9th Cir. 2002) (Section 241(f) waiver; petition granted); *Briseno v. INS*, 192 F.3d 1320 (9th Cir. 1999) (holding that the court lacks jurisdiction to review denial of aggravated felon's motion to reopen to apply for section 212(c) relief); *Martinez-Serrano v. INS*, 94 F.3d 1256 (9th Cir. 1996) (motion to reopen to request a humanitarian waiver; petition denied); *Alquisalas v. INS*, 61 F.3d 722 (9th Cir. 1995) (waiver of deportation; remanded); *Foroughi v. INS*, 60 F.3d 570 (9th Cir. 1995) (Section 212(c) relief; petition granted); *Butros v. INS*, 990 F.2d 1142 (9th Cir. 1993) (Section 212(c) relief; petition granted); *Torres-Hernandez v. INS*, 812 F.2d 1262 (9th Cir. 1987) (Section 212(c) relief; petition denied); *Platero-Reymundo v. INS*, 807 F.2d 865 (9th Cir. 1987) (voluntary departure; petition denied); *Desting-Estime v. INS*, 804 F.2d 1439 (9th Cir. 1986) (to redesignate country of deportation; petition denied); *Williams v. INS*, 795 F.2d 738 (9th Cir. 1986) (reinstatement of voluntary

departure; finding no abuse of discretion); *Mattis v. INS*, 774 F.2d 965 (9th Cir. 1985) (adjustment and waiver of excludability; reversed and remanded); *Avila-Murrieta v. INS*, 762 F.2d 733 (9th Cir. 1985) (Section 212(c) relief; petition denied).